Date: September 12, 1997

Case No. 96-STA-34

In the Matter of:

DOUGLAS P. FRECHIN,
Complainant

v.

YELLOW FREIGHT
SYSTEMS, INC.

Respondent.

Appearances:

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For the Complainant

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For the Respondent

Before: Edward C. Burch
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the provisions of Section 405 of the Surface Transportation Assistance Act of 1982, as amended, 49 U.S.C. § 31105 ("STAA"). In accordance with Section

405, Complainant filed three complaints with the Department of Labor, dated March 20, 1996, April 23, 1996, and May 15, 1996, alleging that Respondent, Yellow Freight Systems, Inc., ("Yellow Freight"), discriminatorily issued letters of intent to suspend and intent to discharge due to the length of time Complainant spent completing pre-trip inspections and due to written complaints regarding defective equipment. Following an investigation, the Regional Administrator of the Occupational Safety and Health Administration concluded that there was no reasonable cause to believe the complaints had merit. On September 4, 1996, Complainant filed timely objections to the findings. A formal hearing was held before the undersigned on July 15, 1997, in Seattle, Washington. Complainant seeks reinstatement[1] with full back pay and benefits as January 6, 1997, and continuing.

Findings of Fact and Conclusions of Law

Respondent Yellow Freight is engaged in interstate trucking operations and maintains a place of business in Seattle, Washington. In the regular course of this business, Respondent's employees operate commercial motor vehicles in interstate commerce, primarily to transport cargo. Respondent is now, and at all times material herein, has been a person as defined in Section 401(4) of the STAA (49 U.S.C. § 31101(3)(A)). (Respondent's Prehearing Statement, Page 2)

Complainant Douglas Paul Frechin, who was 41 at the time of the hearing, has been a commercial truck driver since August 1978 and began working for Yellow Freight on July 1, 1986. (TR 96-97)[2] At all times material herein, Complainant was an employee pursuant to 49 U.S.C. § 31101(2)(A) in that he was a driver of a commercial motor vehicle having a gross weight rating of 10,000 or more pounds used on the highways in interstate commerce to transport cargo and in that he was employed by a commercial motor carrier and, in the course of his employment, directly affected commercial motor vehicle safety. *(*Respondent's Pre-Trial Statement, Page 2) When Complainant began work with Yellow Freight, he was assigned to the Everett terminal. He was terminated in 1991 for eight and a half months[3], and then was reinstated by an arbitrator. (TR 98) After a merger in May 1994, Complainant was transferred to the Seattle terminal, where he remained until a merger with the Kent terminal in August 1996. Thereafter, he was assigned to the Tukwila terminal, one mile south of the old Seattle terminal. (TR 97) Complainant has not hit another moving vehicle as a driver with Yellow Freight. (TR 98)

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[1] During the pendency of this case, Complainant was terminated by Respondent.

[2] The following abbreviations will be used: TR = transcript of the hearing on July 15, 1997; CX = Complainant's exhibits; and RX = Respondent's exhibits. At the hearing, Complainant's exhibits 1-23 and 25 and Respondent's exhibits 1, 5, 9, 10-14, 24, 26, 28, 36, 38 and 43-46 were admitted.

[3] Complainant testified that he was terminated for participation in union activities. He was a delegate to the 1991 Teamsters convention and ran for local office as a trustee. (TR 98, 110; CX 5)

Complainant testified that after he received his manifest, he would locate his truck and, if it was at the dock, approach it from the rear and inspect the back to see if the freight was secured and determine the locations of his first couple of stops. He would then shut the door, secure his gear in the cab and ensure that the landing gear was rolled up and the fifth wheel hooked. Complainant would start the truck, give it a tug to make sure it was properly hooked, honk the horn and pull forward eight to 10 feet. He then began a pre-trip inspection. The inspection included checking all the lights, all connections, air lines, tires, brakes, mud flaps, gauges, oil and air pressure, wipers and defroster or heater. Complainant also checked for tears, cuts, dents, scratches and dings on the trailer and tractor, checked the mirrors and their alignment, made sure windows were clean in and out, ensured that the fire extinguisher was fully charged and checked to see if the registration was in the trailer. He checked the trailer against the manifest and made sure the right tractor was hooked to the right trailer. If his load contained hazardous materials, Complainant also ensured that placards were placed on the trailer. (TR 98-100)

Commercial truck drivers are required by law to ensure the safety of their vehicles prior to operation. Federal law requires that prior to driving a motor vehicle, driver shall "Be satisfied that the motor vehicle is in safe operating condition." 49 C.F.R. § 396.13. Complainant testified that he complies with this regulation. (TR 133) The regulations identify specific items that drivers must make sure are operable.[4] A Commercial Driver's Manual issued in the application process for a commercial driver's license indicates key locations to inspect in different types of rigs. (CX 8)[5] Complainant testified that he follows this guide when he conducts his own pre-trip inspections. (TR 112) Yellow Freight instructs its city drivers to "Inspect your unit according to DOT (Department of Transportation) regulations, as instructed by your dispatcher. If hazardous materials are loaded for delivery and placards are necessary, make sure the right placards have been used. If you're not completely sure, ask your supervisor." (CX 9) Complainant testified that his pre-trip inspection follows DOT regulations. (TR 113)

Work rules posted by Yellow Freight as of January 10, 1996, at the Seattle terminal did not allude to a time frame in which paperwork and the pre-trip inspection must be completed prior to exiting the gate. (TR 113; CX 10) Complainant testified that he had never been given any such rule and never had the understanding that the company expected drivers to be out of the

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[4] "No commercial motor vehicle shall be driven unless the driver thereof shall have satisfied himself/herself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: Service brakes, including trailer brake connections. Parking (hand) brake. Steering mechanism. Lighting devices and reflectors. Tires. Horn. Windshield wiper or wipers. Rear-vision mirror or mirrors. Coupling devices." 49 C.F.R. § 392.7.

[5] A seven-step pre-trip inspection entails (1) vehicle overview; (2) check engine compartment; (3) start engine and inspect inside cab (look at gauges and check condition of controls, mirrors, windshield and emergency equipment; (4) turn off engine and check headlights and flashers; (5) do walkaround inspection; (6) check signal lights; and (7) start engine and check brake system. It concludes by stating, "If you find anything unsafe during the pre-trip inspection, get it fixed. Federal and state laws forbid operating an unsafe vehicle." (CX 8)

terminal in 15 minutes. (TR 113, 143) He had, however, seen a February 15, 1996, memorandum by Dan Hazard, operations manager for Yellow Freight, regarding terminal time reduction.[6] (TR 143-144) Complainant testified that no union official had ever advised him of the 15-minute expectation, he had no conversations with any company or union officials regarding the expectations of Yellow Freight and the issue never arose during pre-shift meetings. (TR 144-145) He testified that he still does not know what time the company wants him out the gate. (TR 147)

At the Seattle terminal, Complainant started work at 9 a.m. from December 1995 to July 1996. (TR 100) On December 18, 1995, Complainant's rig broke down because of a dead battery. Complainant reported the problem to the dispatcher, Mark Hayes, and a mechanic was sent and gave Complainant's rig a jump start. Complainant resumed his route but then discovered his lights and electrical power were out. Complainant asked Mr. Hayes whether he should proceed to Everett or return to the terminal, and was instructed to try to return to the terminal. He then noticed he had no turn signals. A mechanic was dispatched to fix his rig, and Complainant returned to the terminal at 8:05 p.m. (TR 101-103; CX 1) The next day, Complainant was assigned to drive the "hoopie," a straight truck used to make deliveries in downtown Seattle. Complainant testified that on that day, he found the truck to be jammed full and that he needed to rework the load. He testified that he then discovered the cab to be dirty, so he pulled the truck away from the dock, conducted his pre-trip inspection and then went to the wash rack and washed the windows and the inside of the cab. He exited the gate at 9:44 a.m. (TR 117-118; CX 13) On December 22, 1995, Mr. Hazard sent Complainant a warning letter for abuse of company time on December 19, 1995. The letter states that Complainant was observed sitting in his truck at the dock doing "absolutely nothing" for 15 minutes, from 9:15 to 9:30 a.m., before pulling away and driving to the wash area. (CX 13) Complainant testified that he was never just sitting around not doing work. (TR 119)

Complainant called the hoopie assignment a less desirable job and one that provided little opportunity to earn overtime pay.[7] (TR 104) Complainant had earlier been assigned to drive the hoopie starting on April 26, 1995. While driving the hoopie, Complainant filed 23 vehicle inspection reports, dated from August 21, 1995, to March 15, 1996, in which he complained about numerous safety items. He complained about squealing brakes on all but the last report, and the lack of a tachometer on each report. He also noted such items as rough rides, holes in the roof and floor, torn skid boards, a coolant leak, a dangerous lift gate, scratches and dents, broken heater control, loose dash board, cracks in the lift gate and no back up lights. (TR 106-107; CX

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[6] The memorandum states: "Over the past few weeks we have been monitoring our Terminal time. . . Yellow has a standard that we need to attain (1.00), however I feel that we can meet and easily beat this standard. . . . This procedure will enable you to get on the street and service our customers as quickly as possible." (RX 43)

[7] Complainant filed a complaint under Section 405 of the STAA on July 17, 1995, alleging that he was assigned to drive the straight truck in retaliation for his refusal on April 25, 1995, to pull a trailer which he believed to be unsafe. (96-STA-9) Complainant's complaint was dismissed by the Administrative Review Board on August 9, 1996. (RX 5)

3) The hoopie was eventually retired and sold. (TR 149)

Complainant received a second warning for abuse of company time, dated February 29, 1996. The letter by Mr. Hayes states that on the previous day, he dispatched Complainant to a rig that had been pre-hooked and pulled away from the dock, and at 9:10 a.m. he saw that Complainant had backed into the dock and was sweeping light dust off the trailer door. He instructed Complainant over the intercom to get moving, but Complainant said something indistinguishable and continued sweeping. After a second instruction, he again continued sweeping for a minute and then stopped. Mr. Hayes wrote that he found Complainant's rig parked in front of the terminal at 9:25 a.m., and saw Complainant get into the tractor at 9:30 a.m. after leaving the break room. Complainant left the yard at 9:40 a.m. (CX 14) Complainant testified that the rig was not pre-hooked and that he had to hook the tractor to the trailer. He stated that after Mr. Hayes told him to get moving, he responded that he was just wiping the door down. He stated that he only spent 30 seconds sweeping off the door. After sweeping, he stated that he parked out front, used the restroom and then departed in his rig. (TR 122)

A hearing was held on March 5, 1996, regarding Complainant's previous allegation of retaliation by Yellow Freight because of Complainant's safety complaints. Complainant testified at this hearing. (TR 113-114; RX 5) On March 15, 1996, Mr. Hazard sent Complainant a letter of intent to suspend after Mr. Hayes noted that Complainant had not left the yard the day before at 9:20 a.m. Mr. Hazard wrote that Complainant had received his assignment at 9 a.m. and was pre-hooked. He told Complainant that Mr. Hayes found him in his tractor at 9:32 a.m. and asked if there was a problem. In response, the letter states, Complainant refused three times to answer and requested a shop steward. There was no shop steward in the yard at the time, and Complainant left the yard at 9:33 a.m. (CX 15) Complainant testified that he had responded to Mr. Hayes' question by asking if it was an investigation that could lead to discipline, and when Mr. Hayes did not answer, he asked for a shop steward. (TR 123-124) Complainant testified on cross-examination that he never discussed either the warning or the intent to suspend letters with the shop steward, Thomas Schwendeman. (TR 140)

Complainant was issued a letter of intent to discharge on March 28, 1996, which specified that Complainant had received his assignment at 9 a.m. that day, was still in the yard at 9:30 a.m. and was the last driver to leave. The letter stated Complainant was being discharged for abuse of company time. (CX 16) Complainant testified that he was working at all times that day. (TR 125) A second letter of intent to discharge Complainant was issued May 16, 1996. It states that Complainant listed 16 minutes on his May 7, 1996, manifest for completion of paperwork, which "should be done on an on-going basis as you progress through your day." (CX 17) Complainant testified that the paperwork in question, completed between 5:05 and 5:21 p.m., was return slips for two shipments he did not deliver, and that he could not have filled out these slips until after the dispatcher told him at 5:04 p.m. not to deliver those loads.[8] (TR 127-128) Complainant was

[8] Complainant told the dispatcher he saw no reason to make the deliveries because receiving had closed at 3 p.m. (TR 127)

issued a third letter of intent to discharge for abuse of company time on June 7, 1996, based upon Complainant's failure to leave the yard on May 28, 1996, until 9:30 a.m. (CX 18) Complainant testified that he was working at all times on that day. (TR 130)

A fourth letter of intent to discharge was issued on June 7, 1996, this time for abuse of company time for failure to leave the yard until 9:30 a.m. on June 6, 1996. (CX 19) Complainant testified that he was working at all times on this date also. (TR 130) Two more letters of intent to discharge were written on July 25, 1996, stating that Complainant abused company time by not leaving the yard until 9:30 a.m. on July 15 and 17, 1996. A seventh letter of intent to discharge for abuse of company time was issued on July 26, 1996, because Complainant did not leave the yard until 9:24 a.m. on July 23, 1996. An eighth letter of intent to discharge was also issued on July 26, 1996, this time for abuse of company time on July 25, 1996, when Complainant did not leave the yard until 9:25 a.m. (CX 20) Complainant testified that on each of the days in question, he punched in at 9 a.m., checked his manifest, located his truck and conducted pre-trip inspections before leaving the gate. (TR 131, 152-153)

Between 1995 and 1997, Complainant refused to pull overweight rigs approximately half a dozen times. (TR 134)

Yellow Freight terminated Complainant on January 6, 1997. At that time, he earned $18.21 per hour and worked approximately 50 hours per week, including ten hours of overtime. (TR 134-135) On April 15, 1997[9], he started work at noon and Mr. Hayes dispatched him to Home Depot in North Seattle. Complainant testified that he conducted his pre-trip inspection, found an air leak on the dolly and informed Mr. Hayes, who wanted him to drive the rig on the street to a shop for repair. Complainant stated that he refused, and a mechanic was finally sent to fix the leak. Complainant then received a warning letter for failure to follow work instruction because he did not pick up a couple of bills at Home Depot. Complainant testified that he followed the dispatcher's verbal instructions to the letter, "yet he seemed to make up—you know, make up more instructions which I supposedly did not follow." (TR 135-136)

Complainant received all of his warning letters while the company was operating out of the Seattle terminal. (TR 143)

Kelly G. Burke, a commercial truck driver employed by Yellow Freight since 1983, was a coworker of Complainant. (TR 10-11) Mr. Burke, who begins his shift at 9 a.m., testified that it takes him an average of 25 minutes at the Tukwila terminal to drive out the gate after receiving his manifest from Yellow Freight and 20 minutes at the Seattle terminal. (TR 11-12; 18-19) However, manifests showing time of receipt and times out the gate indicated an average interval

[9] Complainant remained on the job during grievance proceedings pursuant to contractual requirements. (TR 141, RX 1)

of 12.36 minutes and a range of 3.4 to 21 minutes.[10] (RX 45) During this interval, Mr. Burke testified that he goes through the manifest and delivery bills, finds the trailer, checks if he is carrying hazardous materials and attaches a placard if required. Mr. Burke also looks at the back of the trailer, places a pallet jack on the trailer and, if necessary, adjusts the load for efficient delivery. He also checks the brakes, tires and lights, inspects the tractor for dents, records his mileage, takes another look at the delivery bills and then heads for the gate. (TR 12-13) Mr. Burke testified that he was not aware of any written rule denoting how much time he had to get out of the gate, and had never been disciplined for taking too long to get out the gate. (TR 13-14) However, he also testified that at the Seattle yard, the company stressed getting out the gate within 15 minutes. (TR 19-20)

Patrick E. McQuade, a commercial truck driver since 1953, worked at Yellow Freight from February 1983 to March 1997 at the Seattle and Tukwila yards and was acquainted with Complainant. (TR 37-38) Mr. McQuade testified that his procedure after receiving his manifest was to inspect it for hazardous materials and discrepancies in the bills, adjust the load in the trailer if necessary and then pull out the trailer if it was hooked up. If the trailer was not hooked up, he would find a tractor, hook it up and perform a pre-check by checking the tires, springs, fluids and fire extinguishers. At times, he would have to clean grease off the windshields, mirrors and taillights. In the event hazardous materials were in the load, he would place placards on all four sides. (TR 38-40) Mr. McQuade testified that it would take him 20 to 30 minutes from receipt of his assignment to leaving the gate, and he was never written up for taking too much time to depart. (TR 41) He also never saw any other employees written up for taking too much time to get out of the gate. (TR 46) Mr. McQuade filed many safety complaints about the brakes and windshield wipers of his tractor at Yellow Freight and was engaged in litigation against Yellow Freight at the time of the hearing. (TR 42-45) Mr. McQuade was placed on light duty at the Yellow Freight yard in Tukwila on January 5, 1997. He testified that during this time, he observed at least 50 percent of the 9 a.m. shift trucks leave the gate by 9:20 a.m. and at least 30 percent of the trucks left at 9:30 a.m. or later. (TR 46-48, 54) Mr. McQuade was terminated during his light-duty assignment. (TR 52) Yellow Freight told McQuade he was discharged for dishonesty for marking his timecard. (TR 53)

Thomas Leroy Schwendeman, a commercial truck driver since 1971 and a coworker of Complainant, was employed by Yellow Freight at the time of the hearing and was a union steward for Teamsters Local 174. (TR 60-61) He was aware of no employee other than Complainant being disciplined for taking too long to get out of the yard. (TR 63) He testified that it takes longer to get out of the Tukwila terminal, because of its larger size and loading differences, than the Seattle terminal. (TR 64-65) Mr. Schwendeman testified on direct examination that he does not understand that Yellow Freight has a policy regarding the time drivers are allowed to get out of the gate. (TR 68) However, he conceded having seen Mr. Hazard's memo regarding terminal time reduction, and that the company had expectations regarding the time its takes drivers to

[10] The manifest clock is based upon 100 clicks per hour, which corresponds to six-tenths of a minute per click. (TR 80, 196-197)

receive their manifest, get into their trucks and leave the gate. (TR 69-74) On cross-examination, Mr. Schwendeman testified that the company's expectation at the Seattle terminal was "twelve clicks" and at the Tukwila terminal "as soon as possible." (TR 74-75)

Charles Edward Bowman, a commercial truck driver since 1959, is a 21-year employee of Safeway. Mr. Bowman testified that prior to taking a semi truck out on the road, he conducts a pre-trip inspection, which takes him 30 to 35 minutes to complete. (TR 87-90) Mr. Bowman drives a refrigerator truck, which he sated was not the same as a hoopie truck. (TR 92) Mr. Bowman testified that Safeway wants drivers to exit the gate within 30 minutes. (TR 92) There is no procedure for pre-hooking at Safeway. (TR 92)

Manifests for other drivers at Yellow Freight indicated intervals of 28 to 34 minutes from receipt of manifest to exiting the gate. (CX 12)

William Calvo, a former Yellow Freight employee, worked as an outbound supervisor, and dispatcher prior to the company's move to the Tukwila terminal. (TR 155, 158) Mr. Calvo testified that he had received instructions from Mr. Hazard regarding drivers leaving the yard in a timely fashion and a "timely fashion was 15 minutes."[11] (TR 156) However, he stated there was no written rule. (TR 169) The expectation did not change after Yellow Freight moved from the Seattle to the Tukwila terminal. (TR 158) Mr. Calvo testified that he relayed this information to drivers in pre-shift meetings. He handed the manifests to drivers either during or at the end of those meetings. (TR 157) Mr. Calvo testified that he previously worked as a driver for Consolidated Freightways and UPS, driving semi trucks and a hoopie, and would complete pre-trip inspections in approximately five minutes. (TR 158-160) Mr. Calvo testified that he met with Complainant and Mr. Schwendeman on May 29, 1996, and discussed why it took Complainant so long to leave the yard in the morning and check out in the evening. (TR 162-163) An e-mail message from Mr. Calvo to Mr. Hazard, dated that day, discusses this conversation.[12] In the message, Mr. Calvo noted that even after the four-minute conversation, Complainant checked out the yard at 9:21 a.m. (RX 26) At the bottom of the message are hand-written notes by Mr. Hazard detailing Complainant's actions on March 28, 1996. The notes indicate as follows:

1. 9 a.m. Give work assignment.
2. 9:13 a.m. Walked to unit.
3. 9:15 Walked around unit. 2 minutes?

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[11] Mr. Calvo was asked the following during direct examination: "And where would you begin to gauge the fifteen minutes from? What would be the time frame within with the fifteen minutes would be applicable?" The witness responded, "Approximately from the time the meeting was over until the drivers punched the manifests." (TR 157)

[12] "I ask Doug why it took him so long to depart the yard and to check-in in the evening. He than said that if I had a problem with this I should follow him with a stop watch and insure that he is doing the proper procedures." (RX 26)

4. 9:17 Drove to front of building and parked.
5. 9:18 Walked into break room—(restroom).
6. 9:24 Walked back to unit and sat in unit.
7. 9:30 Out gate.

(RX 26; TR 167)

Mr. Hazard, operations manager at Yellow Freight, is responsible for operation of the company's facility, including the drivers, dock and office supervisor. Prior to becoming operations manager, Mr. Hazard worked as an equipment operator and city driver for Yellow Freight at one time. (TR 170-171) As a driver, he conducted pre-trip inspections in accordance with DOT guidelines. At that time, the procedure took him five to 15 minutes, assuming no difficulties. (TR 171-172) Mr. Hazard was asked about Yellow Freight's policy regarding the time the company expects a driver to spent "from the time he comes to work, picks up his manifest, and goes out the gate." He responded, "We prefer to get everyone out of the gate within fifteen minutes." (TR 172-173) He stated that this information is made known to drivers through postings and pre-shift meetings. (TR 173)

Regarding his February 15, 1996, memorandum about terminal time reduction, Mr. Hazard testified that the company standard of 1.00 was an index figure which means 27.54 minutes per trip to leave the yard in the morning and return at night. He stated that this memorandum was posted at the dispatch window and in the break room at the Seattle facility. (TR 174-175) Asked whether the index was clear to employees, Mr. Hazard testified that rather than explain the entire index, the company came up with the 15-minute rule—15 minutes out, 15 minutes in. (TR 176) Mr. Hazard testified that Complainant never discussed the February 15, 1996, letter with him. (TR 177)

Mr. Hazard testified that Complainant was terminated for abuse of company time and no other reason. He stated that progressive discipline was applied in that Complainant was given at least one warning notice.[13] (TR 194-195) He had not terminated any other drivers for abuse of company time for the reason Complainant was terminated. (TR 196)

Mr. Hayes, currently weight and research coordinator for Yellow Freight at the Tukwila facility, former worked as operations supervisor at the Tacoma and Seattle terminals. (TR 203-204) While Mr. Hayes was operations supervisor, Complainant was employed at both terminals. (TR 204) On February 23, 1996, Mr. Hayes wrote a statement that he had instructed Complainant not to inspect fluid levels on his equipment unless a warning indicator went off. (TR

[13] Article 46 of the Western States Area Supplemental Agreement, part of the contract governing Complainant's employment with Yellow Freight, stages that the employer shall give at least one warning notice of the complainant against an employee with respect to discharge or suspension except for "cardinal" infractions not relevant to this case. (RX 1)

205; RX 9) Mr. Hayes testified that he gave this instruction after observing him checking levels under the hood because it was abusing time. (TR 206)

Regarding the February 29, 1996, warning letter that he sent to Complainant, Mr. Hayes testified that Complainant had abused company time because he was taking more time than necessary to perform his duties. (TR 208) The manifest for the previous day indicates Complainant received his manifest at 9.03 and left the gate at 9:34 a.m. (RX 10) Mr. Hayes also wrote a statement on March 14, 1996, that he had found Complainant in his tractor at 9:32 a.m. and asked him three times if there was a problem, but Complainant refused to answer and asked for a shop steward. On the statement is a hand-written note by Mr. Hazard that states there was "No one left in yard but Frechin." (RX 13) The manifest indicates that Complaint had received his manifest at 9.02 and left the gate at 9:35 a.m. (RX 14)

Michael Williams McMillan, labor relations manager for Yellow Freight, testified that he told Randy Harris, business agent for Local 174, that he was receiving daily calls that Complainant was taking more than 30 minutes to get out of the yard, and asked him to talk to Complainant and tell him that the company would do whatever it takes the night before so he could make it out the yard with other drivers. He told Mr. Harris he didn't want to have to issue an intent to discharge Complainant. (TR 220) Mr. McMillan testified that he also asked Mr. Schwendeman to talk to Complainant and "get him on the street and stop him from playing these games." He testified that Complainant was discharged for abuse of company time. (TR 221) Mr. McMillan sent Complaint the letter of intent to discharge dated June 7, 1996, based on abuse of company time on June 6, 1996. (RX 24) The manifest dated June 6, 1996, indicates that Complainant left the yard at 9:30 a.m. (RX 28) Mr. McMillan testified that he observed Complainant arrive at the terminal at approximately 8:45 a.m. and walk into the terminal. At 9:12 a.m. he walked to his tractor, and had walked around the tractor by 9:14 a.m. He then drove to the fuel island and at 9:15 a.m. washed his windows. At 9:21 a.m. he pulled to the front of the building, left his tractor and entered the restroom. Complainant then exited at 9:25 a.m., started his tractor at 9:27 a.m. and then shut it off. At 9:28 a.m., he again started his tractor, and at 9:30 a.m. he pulled out of the gate. (TR 227; RX 36) Mr. McMillan testified that driving to the fuel island, washing windows that had already been washed, trips to the restroom and sitting in the tractor were all abuse of company time. (TR 228) He determined based on this that an intent to discharge was appropriate. (TR 228)

Analysis

Section 405(a) of the STAA prohibits a person from discharging, disciplining or discriminating against an employee on the ground that he has filed a complaint "relating to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding." 49 U.S.C. § 31105(a)(1)(A). Additionally, an employee may not be discharged, disciplined or discriminated against on the ground that he refuses to operate a vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or (ii) the employee has a reasonable

apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.SC. § 31105(a)(1)(B). In order to establish a *prima facie* case under the STAA, the complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) he was subjected to adverse action, and (3) the respondent was aware of the protected activity when it took the adverse action. Additionally, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992); *Osborn v. Cavalier Homes of Alabama, Inc.*, 89-STA-10 (Sec'y July 17, 1991).

Protected Activity

The evidence is uncontroverted that Complainant filed a complaint under the STAA on July 17, 1995, alleging that Complainant was discriminated against in violation of the STAA after he refused to drive a trailer which he believed to be unsafe. I find that the complaint clearly relates to a safety violation. The complaint was ultimately dismissed. However, a complaint related to a safety violation is protected under Section 31105(a)(1)(A) even if the complaint is ultimately determined to be meritless. *Allen v. Revco D.S., Inc.*, 91-STA-9 (Sec'y Sept. 24, 1991). Accordingly, I find that the filing of this complaint, as well Complainant's testimony at the March 5, 1996, hearing in support of his complaint, constituted protected activity.

It is further undisputed that Complainant filed 23 internal safety complaints about the straight truck. Each of these complaints specified problems with the vehicle's safety devices, including brakes and the lack of a tachometer, and therefore relate to violations of commercial motor vehicle safety regulations. The Secretary of Labor has held that internal complaints to superiors are protected under the STAA's complaint section. *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993). Therefore, I find that the filing of these 23 internal safety complaints constituted protected activity under the STAA. Respondent does not dispute that Complainant reported to the Yellow Freight dispatcher on December 18, 1995, that he was experiencing electrical problems on his tractor-trailer rig. I find that this report constitutes a complaint that relates to federal safety regulations, and for the reason stated above, conclude that Complainant was engaging in protected activity when he relayed this complaint to his employer. Finally, the evidence shows that Complainant also complained of an air leak on his rig's dolly. I find that this complaint also related to federal safety regulations and also constituted protected activity. Based on the foregoing, Complainant has demonstrated that he engaged in protected activity pursuant to Section 31105(a)(1)(A).

Complainant also alleges violations of Section 31105(a)(1)(B). In order to prevail under Section 31105(a)(1)(B)(i), Complainant must prove that an actual violation of a motor carrier regulation would have occurred had he operated the vehicle. The complainant's good faith belief that the vehicle was unsafe in violation of a safety regulation is not sufficient to prove a violation under this section. *Brunner v. Dunn's Tree Service*, 94-STA-55 (Sec'y Aug. 4, 1995); *Cook v. Kidimula International, Inc.*, 95-STA-44 (Sec'y Mar. 12, 1996) In this regard, Complainant has testified that he refused to pull overweight rigs on six occasions between 1995 and 1997.

However, he has provided no independent evidence to support his assessment that the rigs exceeded weight limitations or otherwise would have violated safety regulations. Complainant has also testified that he refused to drive a rig on April 15, 1997, after he found an air leak on the vehicle's dolly. However, the dispatcher apparently disagreed with Complainant's assessment of the vehicle's safety, since he directed Complainant to drive the rig on the street to a shop for repair. Complainant has provided no other evidence to support his claim that driving the vehicle in this instance would have violated a safety regulation. Based on the above, I find that Complainant has failed to prove that an actual violation would have occurred in either instance, and accordingly has failed to present a *prima facie* case under Section 31105(a)(1)(B)(i).

Protection under Section 31105(a)(1)(B)(ii) applies to a driver who refuses to operate a commercial motor vehicle because he reasonably apprehends serious injury due to the unsafe condition of equipment. Complaint must also prove that he sought and was unable to obtain correction of the unsafe condition. *Williams v. Carretta Trucking, Inc.,* 94-STA-7 (Sec'y Feb. 15, 1995). In the case of the overweight rigs, Complainant has presented no evidence that he sought correction of this unsafe condition. Regarding the dolly's air leak, the evidence clearly shows that Respondent corrected this problem. Therefore, Complainant has failed to present a *prima facie* case of discrimination under this subsection.

Turning to the second prong of Complainant's *prima facie* case under Section 31105(a)(1)(A), it is undisputed that Complainant was subjected to adverse action by Respondent in the form of discipline and, ultimately, discharge. I find that Respondent took adverse action against Complainant on December 22, 1995, when it issued Complainant a warning letter for abuse of company time. I find that further adverse action was taken on February 29, 1996, when Respondent sent Complainant a second warning for abuse of company time, and on March 15, 1996, when Complainant was issued a letter of intent to suspend for abuse of company time. I find that Respondent took adverse action against Complainant in the form of eight letters of intent to discharge, dated March 28, May 16, June 7, July 25 and July 26, 1996, and his eventual termination on January 6, 1997. Additionally, I find that Respondent took adverse action by sending Complainant a warning letter following his April 15, 1997, complaint about the dolly air leak.[14]

Complainant must also demonstrate that Respondent was aware of the protected activity in which Complainant engaged at the time it took the adverse action. Since Complainant's December 18, 1995, safety complaints were communicated directly and immediately to Respondent's operations supervisor, Mr. Hayes, I find that Respondent was aware of Complainant's protected activity on December 18, 1995, at the time it took adverse action against Complainant on December 22, 1995. Further, I find that Respondent was aware that Complainant had filed his July 17, 1995, complaint at the time Respondent issued the above disciplinary letters,

[14] Complainant has not alleged that his assignment to the straight truck on December 19, 1995, constituted adverse action, and I make no such finding.

and further was aware Complainant testified at his own hearing on March 5, 1996, at the time it issued all of its letters of intent to discharge him, dated March 28 to July 26, 1996.

Turning to the 23 safety complaints relating to the straight truck, I note that the vehicle's service history indicates that a number of repairs were made after complaint forms were completed; for example, after Complainant noted a hole in the roof on September 11, 20 and 25 and October 2, 1995, the service history indicates body work was completed on September 26 and October 2, 1995. Similarly, the service history indicates work was done on the tires on December 26, following Complainant's report on December 19, 1995, that the right tire was cut. Based on this kind of response, I find that Yellow Freight was aware that Complainant had engaged in protected activity in filing the safety complaints. I further find that Respondent possessed the awareness of some or all of these complaints at the time it took adverse action against Complaint in the form of disciplinary letters from December 22, 1995, to July 26, 1996. I find that Respondent was aware of all of the protected activities in which Complaint engaged at the time it terminated Complainant on January 6, 1997. Finally, since Complainant complained directely to Respondent's dispatcher about the air leak on his dolly on April 15, 1997, I find that Respondent was aware of this complaint at the time it issued a warning letter at some point after Complaint's shift that day.

Based on the foregoing, I conclude that Complainant has proved by a preponderance of the evidence that he engaged in protected activity, that the Respondent took adverse action against him and that the Respondent was aware of the protected activity when it took the adverse action.

Causation

Finally, Complainant must provide enough evidence to raise an inference that his protected activity was the reason for the adverse action taken by Respondent. The proximity in time between protected activity and adverse action is sufficient to establish the element of causation for purposes of establishing a *prima facie* case. *Moravec v. HC & M Transportation, Inc.,* 90-STA-44 (Sec'y Jan 6, 1992); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986) The Secretary has held that an inference of causation is raised based on a temporary proximity of as long as two months between protected activities and adverse action. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995).

In this case, only four days passed between Complainant's protected activity on December 18, 1995, and his first warning letter on December 22, 1995. Based on the above authority, I find this proximity sufficient to raise the inference of causation. For the same reason, I find a sufficient proximity of time between Complainant's testimony at his hearing on March 5, 1996, and Respondent's letter of intent to suspend the Complainant, dated March 15, 1996. As to the 23 safety complaints spanning a period from August 21, 1995, to March 15, 1996, I find that the complaints taken as a whole are close enough in time to the series of disciplinary letters, dated December 22, 1995, to July 26, 1996, to infer a causal connection. Regarding Complainant's

actual termination on January 6, 1997, I find that it was significantly delayed from the issuance of the letters of intent to discharge. However, since Respondent formed the intent to terminate Complainant in close proximity to the filing of the safety complaints, the fact that he remained on the job because of contractual requirements does not sever the chain of causation. I find the inference is raised to a sufficient degree. On the other hand, I find that the connection between the filing of the July 17, 1995, complaint and any of the adverse actions taken by Respondent is too tenuous to raise any inference of causation in this instance. As for Respondent's warning letter in response to Complainant's failure to make deliveries on April 15, 1997, there is no evidence in the record as to when this letter was issued. However, based on Respondent's course of conduct with regard to its other disciplinary letters, it is probable that this warning was sent within days of the event. Therefore, I find that Complaint has raised an inference of causation in this instance as well.

In summary, I find that Complainant has successfully presented a *prima facie* case of retaliatory discrimination and discharge under the employee protection provisions of the STAA.

Nondiscriminatory Reasons for Adverse Action

An employer attempting to rebut a *prima facie* case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason. The evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981); *Brothers v. Liquid Transporters, Inc.,* 89-STA-1 (Sec'y Feb. 27, 1990).

Respondent has presented testimony by Yellow Freight's operations manager, Dan Hazard, that progressive discipline was applied in Complainant's case, and that his ultimate termination was based on his abuse of company time and no other reason. The labor relations manager, Mr. McMillan, also testified that Complainant's abuse of company time was the reason for his discharge. The record contains 11 disciplinary letters sent over a seven-month period of time, and each of them specifies abuse of company time by the Complainant in repeatedly failing to exit the yard in a timely manner. Along with the letters, the record contains detailed descriptions of Complainant's activities on March 28, 1996, and June 6, 1996. Specifically, I note that on March 28, Complainant was observed spending six minutes just sitting in his truck before departing. Additionally, I note that Complainant on June 6 spent five minutes turning his rig on, off and on again before leaving the gate. Complainant did not merely fail to fulfill the company's 15-minute goal: He deliberately wasted time.

Along with this evidence of Complainant's conduct, Respondent has presented evidence that a policy existed regarding the time frame in which drivers were expected to leave the gate after receiving their manifests. I find that the posted memorandum about reduction of terminal time was clear to the extent that it urged drivers to get out of the terminal as soon as possible. While it referred to a vague standard of "1.00" and did not specify 15 minutes as a goal, I am

persuaded by Mr. Hazard's testimony that Respondent had calculated a total terminal time of 27.54 minutes, and simplified this index figure by setting times of 15 minutes in and 15 minutes out. I also find that this rule was communicated to drivers through pre-shift meetings.

Based upon Respondent's terminal time policy rule and specific examples of abuse of company time by Complainant, I find that Respondent has demonstrated a legitimate, nondiscriminatory reason for the above noted instances of Complainant's discipline and ultimate discharge. As for the final letter regarding Complainant's conduct on April 15, 1997, based on Complainant's own testimony, this letter related to his failure to make two deliveries. I find that this is also a legitimate, non-discriminatory reason to discipline him.

Pretext

Once the employer has articulated a legitimate, nondiscriminatory reason for taking adverse action against the complainant, the burden shifts back to the complainant to prove by a preponderance of the evidence that the proffered reason was a pretext for discrimination. *St. Mary's Honor Center v. Hicks,*509 U.S. 502, 113 S.Ct. 2742 (1993); *Roadway Exp., Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987); *Moyer v. Yellow Freight Systems, Inc.*, 89-STA-7 (Sec'y Nov. 21, 1989) (*rev'd in part on other grounds*).

Complainant asserts that he was never told of the 15-minute policy or any other guidelines relating to leaving the gate within a particular time frame. However, Complainant's testimony conflicts with that of Mr. Calvo, who stated that he specifically told drivers in pre-shift meetings to leave the terminal in a timely fashion, and defined timely as 15 minutes. One of Complainant's co-workers, driver Mr. Burke, testified that he was aware of the 15-minute expectation, and Mr. Schwendeman testified the expectation was even less—12 clicks on the clock, corresponding to 7.2 minutes. Complainant states that even now, he does not know what was expected of him in terms of timeliness. I find this testimony unpersuasive, in the face of the numerous letters sent Complainant. While Complainant maintains he never spoke with anyone about the company's expectations, his testimony is inconsistent with that of Mr. Calvo, who states that he met with Complainant and Mr. Schwendeman and specifically discussed why it took so long for him to leave the terminal. For these reasons, I do not find Complaintant's testimony to be credible.

Complainant has presented testimony by two other Yellow Freight drivers that it takes them more than 15 minutes to leave the gate after receiving their manifests, and they had never been similarly disciplined. Although Mr. Burke testified that it took him an average of 25 minutes at the Tukwila terminal and 20 minutes at the Seattle terminal, actual manifests that he punched and signed revealed an average of less than 13 minutes. Mr. McQuade maintained that he took 20 to 30 minutes to leave the gate; however, Mr. McQuade was involved in litigation against Yellow Freight at the time of the hearing, after having been terminated by the company for dishonesty. Based on the above, I give this testimony very little weight.

Complainant has also provided copies of manifests from other drivers at Yellow Freight, showing intervals ranging from 30 to 35 minutes to leave the gate. These manifests do show that other drivers exceeded the 15-minute expectation, and there is no evidence in the record that they were disciplined. However, it is not clear from the manifests whether these drivers were assigned to the Seattle terminal or instead worked at another terminal, where the 15-minute policy may not have been applicable. Additionally, there is no evidence in the record as to whether these manifests reflect mere delay by the driver or instead other problems, such as mechanical difficulties. Because of these unknowns, this evidence, without more, does not show that Respondent's proffered reason for disciplining and discharging Complainant was a pretext.

I have considered the extensive evidence regarding the pre-trip inspection, which Complainant and other drivers conducted prior to leaving the terminal. I find that Complainant acted in compliance with federal law and Yellow Freight policy by checking his rig before leaving the gate. However, Complainant was not disciplined or discharged for conducting this required inspection. Complainant was disciplined and discharged for abuse of company time, and he has failed to demonstrate that the pre-trip inspection of necessity took so long that he could not comply with the rule. Other drivers could comply, and Complainant was able to conduct the required checks in only two minutes on two occasions while observed by company officials.

As to Complainant's explanation about Respondent's warning for failure to make the two deliveries on April 15, 1997, Complainant asserts that he followed the dispatcher's verbal instructions to the letter, but then accuses the dispatcher of making up other instructions. I find this testimony to be vague and, in light of Complainant's other assertions, not credible.

In summary, I find that Complainant has failed to show by a preponderance of the evidence that Respondent's proffered reasons for his discipline and termination was pretextual. Company officials were not out to get him for voicing his safety concerns. Rather, the record as a whole compels the conclusion that Respondent disciplined and ultimately discharged Complainant because he abused company time and failed to follow work instructions. Complainant was not disciplined and discharged for merely taking too long to conduct the required safety inspections and leave the terminal; on the contrary, he was disciplined and discharged because he intentionally wasted time and defied company policy.

Accordingly, I find and conclude that Respondent's discipline and discharge of Complainant did not violate Section 405 of the STAA.

ORDER

It is recommended that the complaint of Douglas P. Frechin against Yellow Freight Systems, Inc., under Section 405 of the Surface Transportation Assistance Act be DISMISSED.

EDWARD C. BURCH
Administrative Law Judge

San Francisco, CA

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *See* 61 Fed. Reg. 19978 and 19982 (1996).